Filed 5/11/05

**CERTIFIED FOR PARTIAL PUBLICATION***

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>FELIX MICHAEL ANGULO,<br>Defendant and Appellant. | E034875<br>(Super.Ct.No. 310578)<br>**OPINION** |

APPEAL from the Superior Court of Riverside County. Carl E. Davis, Judge. (Retired Judge of the San Bernardino Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Meagan J. Beale,

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A.4, II.B.1-5, II.C-F.

Supervising Deputy Attorney General, and Kyle Niki Shaffer, Deputy Attorney General, for Plaintiff and Respondent.

Felix Angulo appeals from an order committing him to a secured facility after a jury found him to be a sexually violent predator pursuant to the Sexually Violent Predator Act. (SVPA; Welf. & Inst. Code, § 6600 et seq.) We affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *First Prior Petition -- 1998*

In April 1998, the district attorney of Riverside County petitioned for an order pursuant to the SVPA committing Angulo to the State Department of Mental Health (Department) as a sexually violent predator (SVP). The court found probable cause to believe Angulo was an SVP and set the matter for trial.[1] In August 1998, Angulo admitted the allegations of the petition, and the court committed him to the Department for confinement at Atascadero State Hospital (ASH) for two years.

B. *Second Prior Petition -- 2000*

In May 2000, the district attorney petitioned for an order extending Angulo's commitment. Angulo again admitted he was an SVP, and the court again ordered him committed to the Department for two years.

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[1] See Welfare and Institutions Code section 6602.

C. *Current Petition -- 2002*

In June 2002, the district attorney again petitioned for an order extending Angulo's commitment. The court found probable cause and in August 2003 set the matter for trial.

The trial, before a jury, took place in November 2003. Presentation of evidence took five days. The jury found Angulo to be an SVP within the meaning of Welfare and Institutions Code section 6600. The court ordered that Angulo be recommitted to the Department for two years for appropriate treatment in a secured facility.

D. *Trial Testimony*

Most of the testimony at trial came from the People's and Angulo's expert psychologists.

1. *Dr. Scherrer*

Dr. Mark Scherrer, a clinical psychologist working for ASH, testified for the People. Dr. Scherrer first evaluated Angulo in 2000. He evaluated Angulo again in May 2002 in connection with this case. Before making the evaluation, he tried to interview Angulo, but Angulo would not agree, because the interview was not going to be tape-recorded. In July 2003, Dr. Scherrer again tried to interview Angulo, this time with the interview to be tape-recorded. Angulo again refused.

a. *Arkansas convictions -- 1986*

Dr. Scherrer's review of the documents pertaining to Angulo's case showed that in 1986 Angulo had been convicted in Arkansas of sexually molesting a seven-year-old girl

and a 10-year-old boy. Angulo had been living with the children's family for some time when he committed the molestations.

The boy in the Arkansas matter said Angulo had several times placed his penis in the boy's rectum. The girl said Angulo would come to her when she was sleeping, take her into his room, and place his penis between her legs. Angulo was convicted of first degree carnal abuse and first degree sexual abuse and received six years in prison. The comparable California offenses would be sodomy and commission of a lewd and lascivious act on a child

b. *Riverside conviction -- 1992*

Dr. Scherrer's review further showed that in November 1992, Angulo pled guilty in the Riverside Superior Court to committing a lewd and lascivious act on a child in September 1992. The child was the four-year-old daughter of a woman with whom Angulo was living at the time. Angulo received six years in prison. We set forth additional details of the Riverside offense later in this opinion.

c. *Other criminal activity*

Dr. Scherrer also noted that in May 1990 Angulo was convicted of burglary after he entered the residence of two men, got in bed with one of them, and put his hand on the man's penis. Angulo left the room when the man woke up, but when the man went back to his bedroom, he found Angulo in the bed, naked. Angulo left the residence, but when he was later detained he had in his possession a ring taken from the residence.

Angulo's records also showed a history of illegal drug use. There was an indication he may have been under the influence of drugs at the time of the Arkansas

crimes. In addition, Angulo told a counselor his drug use had contributed to the behavior that led to the 1990 burglary conviction.

d. *Angulo's mental condition*

Dr. Scherrer noted that in June 2000, a psychiatrist at ASH diagnosed Angulo as suffering from nonexclusive pedophilia with attraction to males and females, as well as multiple substance abuse disorders. Pedophilia is a sexual deviancy characterized by intense recurrent fantasies, urges, or behaviors of sexual activity with children, generally 13 years old or younger. Nonexclusive means that the pedophiliac is attracted to adults as well as children. Pedophilia is a chronic lifelong disorder.

Dr. Scherrer concurred in the diagnosis of pedophilia. He also diagnosed Angulo as having a personality disorder characterized by antisocial behavior such as lack of regard for the rights of others, lack of remorse, lying, and manipulation. In addition, Angulo's continued commission of criminal acts after he was incarcerated showed he did not have the ability to control his behavior.

Based on Angulo's prior sex offenses, the character of his victims, his age, and other factors, Dr. Scherrer concluded Angulo had a medium-high risk of sexual offending. He fell into the second highest category on a risk assessment scale. Persons in that category of Angulo's age (44) have been shown to have a 40 percent risk of being convicted for reoffending within 15 years. That figure understates the actual probability of reoffending, because not all reoffenders are caught and convicted.

Dr. Scherrer thought Angulo's risk of reoffending was increased due to certain empirical factors that had been shown to correlate with a high level of reoffending: his

personality disorder, his pedophilia, the death of his mother in his infancy, his commission of crimes in addition to the sexual offenses, and the number of his victims. These empirical factors related to past events and would not change over time. In addition, Angulo exhibited certain dynamic factors that increased his risk of reoffending, but that might change: his substance abuse and his failure to pursue any of his treatment programs seriously.

Based on his review, Dr. Scherrer concluded Angulo met the criteria of the SVP law. Dr. Scherrer saw no evidence of significant psychological, emotional, or behavioral change in Angulo that would override his documented history of sexual offenses.

2. *Dr. Starr*

Dr. Dawn Starr, a psychologist in private practice, also testified for the People. Angulo refused to speak with her, and she, like Dr. Scherrer, based her evaluation of him on his records.

Dr. Starr for the most part concurred in Dr. Scherrer's evaluation. She testified Angulo's Arkansas and Riverside convictions qualified as sexual violent crimes involving substantial sexual conduct. She also testified Angulo suffered from paraphilia, specifically pedophilia, with deviant sexual interests or urges involving children and nonconsenting individuals. Finally, she testified Angulo had committed, and was likely to commit in the future, sexually violent predatory offenses.

3. *Dr. Kania*

At Angulo's request, the court appointed Dr. Michael Kania, a psychologist, to evaluate Angulo. Dr. Kania reviewed the police reports from the Arkansas cases and the

1992 California case, as well as previous evaluations of Angulo. He testified for the defense and stated Angulo was unlikely to commit predatory sexual offenses in the future, based on his assessment that Angulo's past offenses had not been predatory.

Dr. Kania noted that in the Arkansas cases, Angulo had been living with the victims' family for a long time before he committed the offenses. He had first lived with the family when his girlfriend also lived there, and she had introduced him to the family. There was no indication Angulo had moved into the residence because he wanted to molest the children, as would be the case with a predatory molestation. The molestations occurred after Angulo had broken up with his girlfriend, when he was experiencing emotional turmoil and confusion about his own sexuality.

With respect to the Riverside offense, Dr. Kania noted that again, Angulo had had a relationship with his girlfriend for a number of years, and had lived with her and her child, before he molested the child. Also, there was no indication he had molested any of his girlfriend's older children, even though he had lived with them as well.

In general, Dr. Kania noted that Angulo did not begin committing sexual offenses until he was an adult, which suggested his disorder was not as deeply entrenched as it would have been had he begun earlier. His last sexual offense had been 11 or 12 years earlier, suggesting his sexual drive was now decreased. Neither his sexual fantasies as a teenager nor his adult fantasies had involved children.

Also, Angulo had established extended relationships (i.e., a year or so) with both women and men, indicating his primary sexual attraction was not to children. In addition, there was no indication Angulo had been molested as a child, which is common

among people who are sexually attracted to children. According to Angulo, his primary sexual attraction was now to adult males. Angulo seemed to Dr. Kania to be ashamed of his prior sexual offenses. However, he did not want to admit he had a problem. For that reason, he did not have much motivation to receive treatment.

Dr. Kania agreed that the Arkansas offenses were sexually violent, in that there was force involved. There was also force used in the Riverside molestation, and substantial sexual conduct.

Dr. Kania also agreed that Angulo suffered from a diagnosed medical disorder, i.e., nonexclusive pedophilia. In addition, he agreed Angulo was likely to engage in sexually violent criminal behavior as a result of his disorder. Based on Angulo's history, Dr. Kania believed that if his adult sexual relationships ended in a dramatic way, he was likely to turn to children.

4. *Other defense witnesses*

Angulo also presented testimony of three ASH employees to the effect that, as far as they knew, his behavior in custody there was good for the most part.

## II

## DISCUSSION

### A. *Denial of Confidential Court-Appointed Experts*

Before trial, Angulo requested that the court appoint one or more mental health care professionals to assist in his defense. Angulo also moved that any court-appointed psychological evaluations performed at his request be kept confidential from disclosure

to the People. The court appointed Dr. Kania to serve as a defense expert but denied Angulo's request for confidentiality.

Angulo contends the court's refusal to appoint psychologists whose reports would be confidential denied his rights to assistance of counsel, to present a defense, and to a fair trial. He contends the evaluations were protected from disclosure by the psychotherapist-patient privilege, the lawyer-client privilege, the work product doctrine, and the privilege against self-incrimination.

1. *Appointment of experts in SVP cases*

In support of his request for appointment of confidential experts, Angulo cited Evidence Code sections 730 and 1017[2] and the SVPA. Section 1017 does not itself confer any authority for appointment of experts. Instead, it addresses the application of the psychotherapist-patient privilege to appointed experts. We discuss that issue, and the application of section 1017, in part II.A.3 of this opinion.

Section 730 does provide for the appointment of experts. That section states in relevant part: "When it appears to the court . . . that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

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[2] Undesignated statutory references are to the Evidence Code.

Section 730, however, does not authorize the appointment of experts whose work will be kept confidential. Instead, it contemplates that any expert appointed will be available for either party to call and examine as a witness. This is evident from section 732. That section states in relevant part: "Any expert appointed by the court under Section 730 may be called and examined by the court *or by any party* to the action." (Italics added.) Thus, Angulo's request for confidentiality under section 730 was misplaced.

The SVPA also authorizes the appointment of experts. Welfare and Institutions Code section 6603, subdivision (a) (Welfare and Institutions Code section 6603(a)) states in relevant part: "In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf."

Welfare and Institutions Code section 6603(a) does not, on its face, preclude the appointment of confidential evaluators. The statute authorizes the court to appoint an expert "to perform an examination *or* participate in the trial on the person's behalf." (Italics added.) Thus, unlike section 730, Welfare and Institutions Code section 6603(a) does not necessarily contemplate that an appointed expert will testify at the trial. It is at least arguable, therefore, that an alleged SVP who has been examined by an expert appointed at his or her request may elect to use the results of the examination to prepare a defense rather than as evidence to be presented at trial.

Angulo requested "that the court-appointed psychiatric *evaluation(s)* requested by respondent's counsel be confidential . . . ." (Italics added.) He did not state that he intended to call the evaluator(s) as witnesses at trial. Thus, he requested evaluators who would "perform an examination" but not necessarily "participate in the trial." (Welf. & Inst. Code, § 6603(a).) Neither Welfare and Institutions Code section 6603(a) nor any other provision of the SVPA directly addresses whether a court is obliged to grant a request for confidentiality under these circumstances. Hence, we must look to the principles governing the disclosure of evidence that apply generally to SVP proceedings.

2. *Disclosure of evidence in SVP proceedings*

The SVPA grants an alleged SVP the right "to have access to all relevant medical and psychological records and reports." (Welf. & Inst. Code, § 6603(a).) The SVPA does not expressly grant the People a reciprocal right of access to records and reports in the possession of or prepared by the defense or its experts.

In *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, however, the Court of Appeal held "that the Civil Discovery Act of 1986 (Code Civ. Proc., § 2016 et seq.) applies in SVPA proceedings." (*Id*. at p. 679.) Shortly thereafter, another Court of Appeal reached the same conclusion in *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980. The *Cheek* court held that "the deposition method of discovery is available" in SVPA proceedings but that "[t]he Civil Discovery Act must be applied in each SVPA proceeding on a case-by-case basis." (*Id*. at pp. 996, 994.)

The Civil Discovery Act provides generally that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the

pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017, subd. (a).) In *Cheek*, the court held that discovery in SVPA cases is limited to the issues of whether the alleged SVP has been convicted of the prior offenses, and has the mental disorder, that are required for commitment under Welfare and Institutions Code section 6600, subdivision (a)(1). (*People v. Superior Court (Cheek), supra*, 94 Cal.App.4th at p. 996.)

Evaluations of an alleged SVP by experts appointed by the court "to perform an examination or participate in the trial" (Welf. & Inst. Code, § 6603(a)) surely are "relevant to the subject matter involved in the pending action" and "reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017, subd. (a).) Such evaluations therefore are discoverable if they are "not privileged." (*Ibid*.) As stated, Angulo asserts he was entitled to confidential evaluations based on the psychotherapist-patient privilege, the lawyer-client privilege, the work product doctrine, and the privilege against self-incrimination. We consider whether any of these grounds for protection was applicable.

3. *Psychotherapist-patient privilege*

The psychotherapist-patient privilege is set forth in section 1014. That section provides in relevant part that a patient "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

Section 1017 creates an exception to the psychotherapist-patient privilege, stating that the privilege does not apply "if the psychotherapist is appointed by order of a court to examine the patient . . . ." However, the exception itself does not apply where the psychotherapist is appointed "upon the request of the lawyer for the defendant in a criminal proceeding . . . ." (*Id*., subd. (a).)

We are not aware of any authority directly addressing whether section 1017 allows an alleged SVP to claim the psychotherapist-patient privilege for evaluations performed by court-appointed experts. The People cite *People v. Martinez* (2001) 88 Cal.App.4th 465 for the proposition that the psychotherapist-patient privilege does not attach to an expert appointed to evaluate a person alleged to be an SVP. However, there is no indication in *Martinez* that the expert was appointed "upon the request of the lawyer for the defendant" (§ 1017, subd. (a)), as would have been necessary for the privilege to attach under section 1017. (*Martinez*, at p. 484.)

Here, defense counsel *requested* appointment of an expert. The relevant question, therefore, is not whether the privilege attaches to an appointed expert, but whether an SVPA case should be considered a "criminal proceeding" for purposes of the exception to section 1017.

As a general matter, courts describe SVP proceedings as "civil and nonpunitive in nature." (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404; see also *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1166 [SVPA was intended "to establish a nonpunitive, civil commitment scheme"].) The court in *People v. Superior Court (Cheek)*, *supra*, 94 Cal.App.4th 980, stated that "an SVPA commitment proceeding is a

special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action." (*Id*. at p. 988.) Similarly, the court in *Leake v. Superior Court*, *supra*, 87 Cal.App.4th 675, stated: "It is apparent that the Legislature designed the SVPA as a civil action or special proceeding of a civil nature because it set the SVPA in the Welfare and Institutions Code among other civil commitment statutory schemes." (*Id*. at p. 680.)

Angulo acknowledges the authority characterizing SVP proceedings as civil, but argues that whether an SVP proceeding is a civil proceeding for *all* purposes remains unresolved. He notes that SVP offenders are afforded some rights usually extended only to criminal defendants, such as appointed counsel for indigent offenders. (Welf. & Inst. Code, § 6603(a).)

The California Supreme Court has indeed recognized that "[a]lthough the SVPA is a civil proceeding, its procedures have many of the trappings of a criminal proceeding." (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1192 (*Hurtado*).) As examples, the *Hurtado* court cited the probable cause hearing required by Welfare and Institutions Code section 6602, the rights to appointed counsel and to a unanimous verdict under Welfare and Institutions Code section 6603, and the requirement of proof beyond a reasonable doubt under Welfare and Institutions Code section 6604. (*Hurtado*, at p. 1192.)

In *Hurtado*, the trial court failed to instruct the jury that it must find the defendant was likely to commit future predatory acts in order to find he was an SVP. The Supreme Court held that this error was "reversible unless shown to be harmless beyond a

reasonable doubt . . . ." (*Hurtado, supra*, 28 Cal.4th 1179, 1194.) Thus, it applied the standard of prejudice for federal constitutional error in *criminal* cases, as set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065]. In contrast, "when the jury receives an improper instruction in a *civil* case, prejudice will generally be found only '"[w]here it seems probable that the jury's verdict may have been based on the erroneous instruction . . . ."' [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, italics added.)

The court in *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677 (*Bagration*) similarly declined to apply civil procedural rules in an SVPA matter. The court held that civil summary judgment procedures should not apply to SVP proceedings. (*Id*. at p. 1689.) It explained that "Code of Civil Procedure section 437c is inherently inconsistent with the SVP Act because the *mutual* summary procedures set forth in Code of Civil Procedure 437c, if applied to SVP Act proceedings, would allow an individual to be adjudicated a sexually violent predator without benefit of the required beyond a reasonable doubt proof burden of proof and, in the case of a jury trial, a unanimous verdict -- impairing the requirements that are at the heart of the statute's due process protections." (*Id*. at pp. 1688-1689.)

In contrast to *Hurtado* and *Bagration*, the United States Supreme Court in *Kansas v. Hendricks* (1997) 521 U.S. 346 [117 S.Ct. 2072, 138 L.Ed.2d 501] (*Hendricks*) declined to treat a proceeding under the Kansas SVP act as a criminal matter for purposes of the constitutional prohibitions on double jeopardy and ex post facto lawmaking. The provisions of the Kansas act in *Hendricks* were virtually identical to those of California's

SVPA. Like the California act, the Kansas act provided for appointment of counsel and experts for indigent parties, a 12-person jury trial, and proof beyond a reasonable doubt. (K.S.A. §§ 59-29a06, 59-29a07.)

The *Hendricks* court nonetheless held that confinement under the act did not constitute punishment. Hence, the act was civil in nature, and confinement based on an SVP's past commission of predicate offenses did not violate the double jeopardy and ex post facto clauses. (*Hendricks*, *supra*, 521 U.S. 346, 370-371.)

The *Hendricks* court stated that in determining whether a particular proceeding is civil or criminal, "we ordinarily defer to the legislature's stated intent." (*Hendricks*, *supra*, 521 U.S. 346, 361.) The court determined the intent of the Kansas Legislature was to establish civil proceedings, citing the facts that the legislature placed the act in the probate code, not the criminal code; the legislature described the act as creating a "civil commitment" procedure; the act was not retributive, because it did not "affix culpability for prior criminal conduct" but used the conduct "solely for evidentiary purposes"; no finding of scienter was required to commit an individual found to be an SVP; the act was not intended to function as a deterrent, because persons suffering from mental disorders were "unlikely to be deterred by the threat of confinement"; persons confined under the act were not subject to the restrictions placed on prisoners; the confinement was limited to one year and could only be renewed with a new showing that the individual still met the criteria for confinement; the act permitted immediate release upon a showing that the individual was no longer dangerous; and treatment of the individual confined was "at least an ancillary goal of the Act, which easily satisfies any test for determining that the

Act is not punitive." (*Id*. at pp. 361-368 & 368, fn. 5.) All of these attributes are equally true of the SVPA.

We can discern from these decisions a consensus that whether an SVP proceeding should be treated as civil or criminal in a given case depends on the specific right or privilege at stake. In *Hurtado*, assessing prejudice under the ordinary civil standard would in effect have permitted involuntary confinement despite a reasonable doubt whether the verdict had been affected by an error of constitutional dimension. The right of proof beyond a reasonable doubt as a prerequisite to confinement, which is explicitly recognized in the SVPA, demanded the stricter *Chapman* harmless error test. Similarly, in *Bagration* the application of the civil summary judgment procedure would have denied the right to proof beyond a reasonable doubt and the right to a unanimous verdict, both of which are expressly conferred by the SVPA and recognized as fundamental due process guarantees.

In *Hendricks*, however, these rights, though guaranteed by the SVP act, were not directly implicated in the case before the court. Instead, the issue was the constitutionality of basing civil confinement on past conduct that had already been criminally punished. Because the purpose of the SVP act was not to punish but to protect the public and to treat the offender if possible, the double jeopardy and ex post facto rights were not at stake, and it was appropriate to treat the matter as a civil proceeding.

Applying this analysis to this case leads us to conclude the court did not err in declining to appoint confidential experts to evaluate Angulo. As noted, Angulo claims the ruling deprived him of his rights to assistance of counsel, to present a defense, and to

a fair trial. However, these rights were not undermined by the lack of confidential experts.

The right at stake in considering whether to apply the "criminal proceeding" exception to section 1017 is the right of a defendant to prepare and present a defense based upon mental illness. The exception applies where a psychotherapist is appointed at the request of the defendant's lawyer "to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition." (§ 1017, subd. (a).)

It is incongruous to speak of an insanity "plea" or a mental illness "defense" in an SVPA proceeding. The question in an SVPA proceeding is not whether the offender's mental condition excuses him or her from criminal culpability, but whether the condition makes him or her a threat to society. Mental illness is not a defense; it is the basis on which the offender may be found dangerous to others and hence subject to civil commitment. The only "defense" available to the offender is simply to show that he or she is no longer dangerous.

The discoverability of a defense expert's evaluation under section 1017 does not interfere with the ability of the defense to show that the offender is no longer dangerous. In an SVPA case, the People already will have obtained evaluations from two experts concluding the subject meets the SVP criteria. A defense evaluation *concurring* in that conclusion is merely cumulative, since two opinions are enough to establish the People's case. Therefore, the fact it is discoverable is irrelevant.

A defense evaluation reaching a *different* conclusion, as in this case, benefits the offender. Hence, there is no reason for the defense to want to keep that evaluation confidential. In either case, the rights to assistance of counsel and to present a defense are not compromised.

The fact a defense evaluation is discoverable under section 1017 also does not deprive an offender of the right to a fair trial. In fact, applying the "criminal proceeding" exception to section 1017 would be decidedly unfair in an SVPA proceeding. In this case, for example, Dr. Kania, unlike Dr. Scherrer and Dr. Starr, was able to interview Angulo personally and speak to him about his sexual history. Had Angulo been granted his request for confidential experts, he would have been able to obtain evaluations that would have been unavailable to the district attorney and concealed any evaluations he considered unfavorable.

The district attorney had no such reciprocal right. To file an SVPA proceeding, the Department must obtain at least two expert opinions that the offender has a diagnosed mental disorder making him or her likely to engage in acts of sexual violence. The Department can consult a total of four experts to obtain the required evaluations. (Welf. & Inst. Code, § 6601, subds. (d)-(h).)

Nothing in the SVPA permits the district attorney to keep any of these evaluations confidential. To the contrary, the SVPA provides that an alleged SVP is entitled "to have access to *all* relevant medical and psychological records and reports." (Welf. & Inst. Code, § 6603(a), italics added.) Nothing in the statute limits this access to reports that support a finding that the offender meets the SVP criteria. Accordingly, the offender has

access to any dissenting report when the Department is obliged to consult more than two experts and to any other documents that may suggest the offender does not meet the criteria.

Angulo also contends it would be unfair to deny indigent alleged SVP's the right to retain confidential experts to assist in preparing their defenses, because alleged SVP's who can afford it can hire as many experts as they desire and keep their evaluations confidential as long as they do not testify. However, even in the context of a criminal prosecution the Supreme Court has expressly rejected "the unsupported assumption that any advantage which is available to the wealthy defendant must, of constitutional necessity, be extended to an impecunious one, thus assuring equality of treatment." (*People v. Jackson* (1980) 28 Cal.3d 264, 286, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [Pen Code, § 1095 did not entitle capital defendant to appointment of additional counsel to argue the cause].)

For these reasons, we conclude the rule set forth in section 1017 that the psychotherapist-patient privilege applies to a court-appointed expert in a criminal proceeding does not apply in an SVPA proceeding. Accordingly, the trial court's denial of confidential experts did not violate the psychotherapist-patient privilege.

4. *Other privileges*

As noted, Angulo also argues he was entitled to confidential experts based on the lawyer-client privilege, the work product doctrine, and the privilege against self-incrimination. However, he asserts these claims only in passing, without any supporting

authority or argument. We therefore are not obliged to, and do not, address them. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

B. *Use of Hearsay by People's Expert Witnesses*

In concluding Angulo qualified as an SVP, Dr. Scherrer and Dr. Starr relied in part on facts recited in police reports of Angulo's prior offenses. Angulo contends the use of the police reports for that purpose (1) was not authorized by any statute or case authority (2) violated the hearsay rule (3) deprived Angulo of his right of confrontation and his right to due process and (4) violated *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (*Crawford*), which was decided after this case was tried.

1. *Evidence and ruling*

a. *Arkansas offenses*

The People's exhibits included police reports pertaining to Angulo's prior offenses in Arkansas. One of the reports stated that the female victim in the Arkansas matter had said Angulo "on more than one occasion, had picked her up while she was sleeping late at night and took her into his bedroom. Once in the bedroom, he would take his clothes off and then take her clothes off. Angulo would then get on top of her and she stated that she could feel his penis between her legs."

A supplemental police report from the Arkansas matter recited that the male victim "stated that on more than one occasion [Angulo] used to take [the victim] out of his bed and carry him upstairs to his [Angulo's] room. Once in the room, [Angulo] would take [the victim's] clothes off and put [the victim] on his stomach and in [the victim's] words 'butt screw me.'"

Another supplemental report recited that a second male victim had told the police "that on more than one occasion [Angulo] had come into his bedroom late at night and tried to pick him up and take him to his [Angulo's] bedroom. . . . [The victim] did advise that [Angulo] had played with [the victim's] penis on more than one occasion and that [the victim] had seen [Angulo] play with [the first male victim's] penis."

Another police report from the Arkansas matter stated that when Angulo moved out of the Arkansas residence and went to California, "three magazines depicting homosexuals displaying themselves and performing homosexual acts" were found in the room Angulo had been occupying.

b. *Riverside offenses*

A probation officer's postsentence report from the 1990 Riverside matter, in which Angulo was convicted of burglary for entering the apartment of the two men, described the facts of the offense and listed the source as "Corona Police Officers' Report."

The probation officer's postsentence report in the 1992 Riverside matter, in which Angulo was convicted of committing a lewd act with a child in violation of Penal Code section 288, subdivision (a), set forth the circumstances of the offense, as related by the victim's mother: The mother "walked into her living room . . . and observed the defendant with his hand up the victim's dress. The defendant quickly removed his hand and became angry. [The mother] noticed that the defendant had an erection and confronted him, at which time he denied that anything was going on. [The mother] did not question the defendant further because she was afraid of him." The source for this information was listed as a Riverside County Sheriff's Department report.

c. *Ruling*

Before and during trial, defense counsel objected to the district attorney's use of the police reports and the probation reports that were based on the police reports, on the grounds of multiple hearsay, lack of foundation and authentication, due process, equal protection, and the right of confrontation. The court overruled the objections and admitted the documents, though it did require the district attorney to make some redactions to them.

2. *Waiver*

The People contend Angulo waived his claims because his own expert, Dr. Kania, also referred to the police reports in his testimony. This contention has no merit, because Dr. Kania testified only after the court had overruled Angulo's objection to the use of the police reports and Dr. Scherrer had testified based on the reports. The People could have used the police reports in cross-examining Dr. Kania regardless of what Angulo did. Angulo therefore did not invite or consent to any error in admitting the reports by allowing Dr. Kania to refer to them.

The People's citation of *People v. McPeters* (1992) 2 Cal.4th 1148 does not support their argument. In *McPeters*, the defendant tendered his mental condition as an issue in the penalty phase of a capital case. Therefore, the court held he could not prevent the prosecution from showing he refused to be interviewed by a prosecution psychiatrist. (*Id*. at p. 1190.)

Here, however, a showing that Angulo suffered from a mental disorder sufficient to make him an SVP was part of the People's burden of proof. The People, not Angulo, tendered the issue of his mental condition.

The People's citation of *People v. Von Villas* (1992) 11 Cal.App.4th 175 also is unpersuasive. In that case, defense counsel at first objected to the prosecution's use of a newspaper clipping. However, during cross-examination of a prosecution witness counsel decided the clipping would be useful for impeachment and used it for that purpose. Later, when the court considered the admission of exhibits, defense counsel specifically indicated he had *no objection* to the exhibit. The court stated: "[Defendant's] tactical decision not to object to the introduction of the clipping as excised constitutes a waiver of the issue on appeal. [Citation.]" (*Id*. at p. 237.) The record does not show any comparable tactical decision in this case.

3. *Statutory and case authority*

Welfare and Institutions Code section 6600, subdivision (a)(3) (Welfare and Institutions Code section 6600(a)(3)) states in relevant part: "The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health."

We are not aware of any authority directly addressing whether police reports may be used to show the details of a prior conviction under Welfare and Institutions Code

section 6600(a)(3). Angulo contends the fact the Legislature in that section specifically included "probation and sentencing reports" shows that its failure to specifically include police reports was deliberate. That is, the Legislature knew that neither probation reports nor police reports are normally included in the record of a prior conviction and intended that probation reports be admissible but not police reports.

Angulo's contention is inconsistent with the plain language of Welfare and Institutions Code section 6600(a)(3). The statute provides that documents "including, but not limited to" the documents specifically listed may be used. The phrase "including but not limited to" in a statute "is a phrase of enlargement rather than limitation." (*People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1414.)

Further, "[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage. [Citation.]" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Angulo's construction of Welfare and Institutions Code section 6600(a)(3) as limited to the documents expressly listed would make the entire phrase "including but not limited to" superfluous.

Angulo's contention is also inconsistent with the decision of the California Supreme Court in *People v. Otto* (2001) 26 Cal.4th 200 (*Otto*). In *Otto*, the trial court denied an alleged SVP's motion to exclude "'police or other hearsay reports' and prevent psychological evaluators from relying on them." (*Id*. at p. 204.) The Court of Appeal affirmed, and the Supreme Court affirmed the judgment of the Court of Appeal. (*Id*. at pp. 204, 215.)

The Supreme Court held that Welfare and Institutions Code section 6600(a)(3)'s express authorization of the use of probation and sentencing reports "implicitly authorizes the admission of hearsay statements in those reports." (*Otto, supra*, 26 Cal.4th 200, 207.) The court then noted that California Rules of Court, rule 4.411.5 (rule 4.411.5) "contemplates that *police reports* will be used as a source of information for summarizing the crime in the presentence report. [Citations.]" (*Otto*, at p. 207, italics added.)

Rule 4.411.5 sets forth the categories of information that a probation officer's presentence report "shall include." Several of the categories encompass police reports or information they ordinarily contain: "The facts and circumstances of the crime and the defendant's arrest"; "the victim's statement or a summary thereof"; and "written statements from: . . . official sources such as defense and prosecuting attorneys, [and] *police* (subsequent to any police reports used to summarize the crime) . . . ." (Rule 4.411.5(a)(2), (5), (7), italics added.) Thus, *Otto* concluded: "By permitting the use of presentence reports at the SVP proceeding to show the details of the crime, the Legislature necessarily endorsed the use of multiple-level-hearsay statements that do not otherwise fall within a hearsay exception." (*Otto, supra*, 26 Cal.4th 200, 208.)

Angulo contends that *Otto* did not ask, nor did it answer, the question whether police reports are admissible in SVP proceedings to establish proof of predicate prior offenses and other offenses used to show that an offender meets the criteria for an SVP. While the *Otto* court did not say the words "police reports are admissible," it is difficult to draw any other conclusion from reading the opinion.

At the start of the opinion, the *Otto* court said the question it had to decide was "whether [Welfare and Institutions Code] section 6600(a)(3) allows the admission of multiple hearsay that does not fall within any exception to the hearsay rule . . . ." (*Otto*, *supra*, 26 Cal.4th 200, 204.) The court then answered the question by stating that section 6600(a)(3) "implicitly authorizes the admission of hearsay statements" in presentence reports and that rule 4.411.5 "contemplates that *police reports* will be used as a source of information for summarizing the crime in the presentence report. [Citations.]" (*Otto*, at p. 207, italics added.) Further, the court *affirmed* a Court of Appeal judgment affirming a trial court's *denial* of an alleged SVP's motion "to exclude '*police* or other hearsay reports' and prevent psychological evaluators from relying on them." (*Id*. at p. 204, italics added.) We can see no remaining room for a credible argument that *Otto* leaves open the question of whether police reports are admissible for their content to prove the circumstances on an alleged SVP's prior offenses.

In addition, if the factual summary of the crime in a probation report is based on a probation officer's personal interviews of the victims, police reports based on interviews closer to the time of the offense are likely to be at least as reliable. If, on the other hand, the probation report is simply based on the police reports, it makes no sense to admit one but not the other.

Of course, a police report might be subject to redaction to remove irrelevant or unduly prejudicial material pursuant to section 352, but that is equally true of a probation report. At any rate, that is not the issue Angulo has raised. For the reasons stated, we conclude *Otto* refutes Angulo's claim that the trial court erred in admitting the reports.

4. *Hearsay*

*Otto* also refutes Angulo's contention that the police reports were inadmissible as hearsay. As noted, in *Otto* the Supreme Court stated: "By permitting the use of presentence reports at the SVP proceeding to show the details of the crime, the Legislature necessarily endorsed the use of *multiple-level-hearsay* statements that do not otherwise fall within a hearsay exception." (*Otto, supra*, 25 Cal.4th at p. 208, italics added.) Therefore, the court concluded, "the hearsay statements at issue fall within an express statutory exception . . . ." (*Id.* at p. 209, italics added.)

The hearsay rule only applies "[e]xcept as provided by law" (§ 1200, subd. (b)). Since, according to *Otto*, Welfare and Institutions Code section 6600(a)(3) created "an express statutory exception" that applies to hearsay statements in police reports, the trial court properly overruled Angulo's hearsay objection.

5. *Confrontation and due process*

a. *Right of confrontation in SVPA proceedings*

"The protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.' [Citation.]" (*Austin v. U.S.* (1993) 509 U.S. 602, 608 [113 S.Ct. 2801, 2804, 125 L.Ed.2d 488], fn. omitted.) Therefore, unlike a criminal defendant, an alleged SVP does not have a right of confrontation under the Sixth Amendment. Instead, his or her right of confrontation is based on due process: "There is no right to confrontation under the state and federal confrontation clause in civil proceedings, but such a right does exist under the due process clause. [Citation.]" (*Otto, supra*, 26 Cal.4th 200, 214.)

The distinction is significant. "[D]ue process requirements are more flexible and capable of being tailored to the individual facts than is the confrontation clause whose mandate is close to being absolute . . . ." (*LaChappelle v. Moran* (1st Cir. 1983) 699 F.2d 560, 565.) Accordingly, "'[o]nce it is determined that due process applies, the question remains what process is due.' [Citation.]" (*Otto*, *supra*, 26 Cal.4th 200, 210, quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 2600, 33 L.Ed.2d 484].)

In *Otto* the Supreme Court identified four relevant factors in applying the due process right of confrontation to SVPA proceedings: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of the interest; (3) the government's interest; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story. (*Otto*, *supra*, 26 Cal.4th 200, 210.)

Applying those factors to the case before it, the *Otto* court concluded that reliance on victim hearsay statements to prove predicate offenses did not violate the due process right of confrontation. The court acknowledged that Otto's liberty interest was "significant." (*Otto*, *supra*, 26 Cal.4th 200, 210.) It also acknowledged Otto's interests in being informed of the charges and presenting his side of the story before a responsible government official. (*Id*. at p. 215.) However, the court noted "the strong government interest in protecting the public from those who are dangerous and mentally ill." (*Id*. at p. 214.) Requiring the government to adduce live testimony from victims, or recorded testimony from the prior criminal proceedings, would impede that interest and would, as

a practical matter, make it impossible for the government to prove its case where the defendant had pled guilty. (*Id*. at pp. 214-215.)

The *Otto* court found these competing interests could appropriately be balanced by requiring that the hearsay statements "contain special indicia of reliability to satisfy due process." (*Otto, supra*, 26 Cal.4th 200, 210.) We discuss now the indicia on which the court in *Otto* relied in finding there was no due process violation in that case and whether those factors are present here.

b. *Fact of conviction*

The *Otto* court first stated that the "most critical factor demonstrating the reliability of the victim hearsay statements" is the fact that the alleged SVP "was convicted of the crimes to which the statements relate. . . . As a result of such a conviction, some portion, if not all, of the alleged conduct will have been already either admitted in a plea or found true by a trier of fact after trial." (*Otto, supra*, 26 Cal.4th 200, 211.)

Angulo asserts the fact he was convicted of the Arkansas and Riverside offenses should not be considered an indication of the reliability of the police reports under *Otto*, even though he pled guilty to the offenses. He claims it is unknown whether Arkansas required any findings upon entering a guilty plea in 1985 or whether any findings were made.

This assertion is inconsistent with the record. The judgment from the Arkansas matter expressly stated that Angulo pled guilty to one count of first degree sexual abuse and one count of first degree carnal abuse and that "[t]he Court determined that

Defendant's plea was voluntary and that *there is a factual basis for the plea*." (Italics added.)

Angulo also claims his Riverside conviction for child molestation is unreliable because the minute order of the plea states he pled guilty pursuant to "People vs West." (*People v. West* (1970) 3 Cal.3d 595.) Angulo asserts this plea was not a specific admission that the victim's statements were true. However, the minute order further states: "*Factual basis taken*." (Italics added.)

Even if we assume Angulo declined to make any express admission of guilt when he entered his pleas in the Arkansas and Riverside matters, federal and state law both require that if a defendant pleads guilty but protests his innocence, the court cannot accept the plea unless it determines there is a factual basis for it. The United States Supreme Court has stated that "pleas coupled with claims of innocence should not be accepted *unless there is a factual basis* for the plea [citations] and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. [Citations.]" (*North Carolina v. Alford* (1970) 400 U.S. 25, 38-30, fn. 10 [91 S.Ct. 160, 27 L.Ed.2d 162], italics added.) The California Supreme Court similarly has held that "an accused's claim of innocence does not preclude entry of a guilty or nolo contendere plea where the court taking the plea ascertains a 'factual basis' therefor. [Citations.]" (*In re Alvernaz* (1992) 2 Cal.4th 924, 940-941, fn. 9.)

"In the absence of any indication to the contrary we presume, as we must, that a judicial duty is regularly performed. [Citations.]" (*People v. Visciotti* (1992) 2 Cal.4th 1, 49.) Accordingly, "[a]s a general rule, we presume that the trial court has properly

followed established law. [Citations.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 567.)

Here, established law plainly required that the Arkansas and Riverside courts not accept Angulo's guilty pleas unless there was a factual basis for them. We therefore must presume each court found sufficient evidence to satisfy itself that Angulo did, in fact, commit the offenses. The factual record in each case consisted primarily of the police reports and, in the Riverside matter, the probation officer's report, which was prepared from the police reports. That being the case, the fact of the prior convictions -- the "most critical factor demonstrating the reliability of the victim hearsay statements" (*Otto, supra*, 26 Cal.4th 200, 211) -- supports the court's decision to admit the reports.

c. *Other factors*

In addition to the fact of conviction, the *Otto* court identified the following as factors that showed the hearsay statements in that case were reliable: (1) a defendant in a criminal case has a statutory right to review and challenge a probation report (*Otto, supra*, 26 Cal.4th 200, 212); (2) trial courts routinely rely on hearsay in probation reports in determining an appropriate sentence in criminal cases, and Rule 4.411.5 contemplates that police reports will be used to prepare probation reports (*Otto*, at p. 212); (3) Otto never challenged the accuracy of the victims' statements in the prior case and admitted some of the facts stated by the victims to an examiner (*id*. at p. 213); and (4) in the SVPA proceeding, Otto's own expert opined that Otto had been convicted of sexually violent predatory offenses against two or more victims. (*Ibid*.)

Turning first to factor (1), we note there is no indication whether a probation report was prepared in the Arkansas case or whether Angulo would have had the right to

challenge it under Arkansas law. A probation report was prepared in the Riverside matter, but it was a postsentence report, so it is not clear whether Angulo had an opportunity to challenge inaccurate statements in it.

It is noteworthy, however, that Angulo had the *right* to have the report prepared before sentence was imposed. (Pen. Code, § 1203d.) The fact he apparently did not exercise that right suggests he did not claim, or knew he could not show, that the facts on which the court based the sentence were incorrect. Presumably, those facts included the facts set forth in the postsentence report, which came from police reports. Thus, factor (1), at least by inference, supports reliability of the account of the Riverside offense set forth in the probation report.

Factor (2) is a general observation about sentencing practices in criminal cases and therefore applies to this case. Police reports are considered trustworthy enough to be relied on not only in probation reports, but also in other contexts. In *People v. Norrell* (1996) 13 Cal.4th 1, for example, the Supreme Court relied on police reports as one basis for the factual recitation in its opinion. (*Id*. at p. 3, fn. 1.) Factor (2) therefore supports reliability.

Factor (3) does not weigh for or against reliability. The record does not show either that Angulo challenged or that he admitted the facts of the Arkansas and Riverside cases when he pled guilty. The Arkansas documents state Angulo denied guilt when he was arrested for two of the molestations, but there is no indication whether he continued to do so when he pled guilty. The Riverside documents state Angulo declined to speak to

the probation officer who prepared the postsentence report, so there is no indication as to what his position was.

Turning to factor (4), we note Dr. Kania concurred in the opinions of the People's experts that Angulo had engaged in sexually violent behavior in the past and was likely to do so in the future. He differed from the other experts only in that he did not think the offenses were predatory. He also agreed with the People's experts that Angulo suffered from nonexclusive pedophilia. Therefore, factor (4) supports reliability.

In addition to the reliability of the victims' hearsay statements as measured under factors (1) through (4), the *Otto* court identified two remaining factors that "diminish the risk of an erroneous deprivation of rights as a result of reliance on the hearsay statements . . . ." (*Otto*, *supra*, 26 Cal.4th 200, 214.) First, in the SVPA proceeding, Otto had the opportunity to put on his own evidence and cross-examine the People's witnesses. (*Id*. at p. 214.) Second, the court in the SVPA proceeding had the discretion to exclude unreliable hearsay under section 352. (*Otto*, at p. 214.) Both factors apply in this case, and therefore support reliability here.

Considering each of the factors identified in *Otto*, we conclude the court did not violate Angulo's due process right of confrontation by admitting the police reports. The "most critical factor" identified in *Otto* -- the fact of conviction (*Otto*, *supra*, 26 Cal.4th 200, 211) -- is fully present here. As noted, all but one of the other factors also support reliability.

Dr. Kania's testimony is particularly significant in assessing reliability. He testified that in making his evaluation he relied primarily on the police reports. He

explained: "So I rely primarily on the records that are available. And in this case, those were primarily police reports."

In three interviews with Dr. Kania, totalling about eight hours, Angulo never admitted any of the prior molestations and generally denied molesting children. Dr. Kania nonetheless concurred with the People's experts that Angulo had committed sexually violent offenses in the past and was likely to do so in the future. The conclusion is therefore inescapable that he considered the police reports *more* reliable than the statements of Angulo, the party for whom he testified.

For these reasons, we conclude the police reports were sufficiently reliable to satisfy due process requirements. The court did not err in rejecting Angulo's claim that the admission of the reports violated his right of confrontation.

6. *Crawford*

Angulo suggests admission of the police reports violated *Crawford*, *supra*, 541 U.S. 36. In *Crawford*, the Supreme Court held that admission of a "testimonial" hearsay statement by a declarant who is not available at trial violates the Sixth Amendment confrontation clause unless the defendant had a prior opportunity to cross-examine the declarant. *Crawford* also held that a statement obtained by a police officer in the course of an interrogation is testimonial. Finally, *Crawford* held the admission of such a statement violates the Sixth Amendment even if the statement would be admissible hearsay under the jurisdiction's rules of evidence and even if it bears indicia of reliability. (*Crawford*, *supra*, 541 U.S. at pp. 52-54, 59, 68.)

*Crawford* does not apply here, for two reasons. First, *Crawford*, a criminal case, was based solely on the Sixth Amendment right of confrontation. The opinion never discussed the due process right of confrontation that is applicable in civil proceedings. At best, *Crawford* leaves open the question whether testimonial hearsay statements must be excluded even under the less stringent due process confrontation standard.

While we are not aware of any California authority holding that *Crawford* does not apply to civil commitment proceedings, the Supreme Judicial Court of Massachusetts reached that conclusion in *Commonwealth v. Given* (2004) 441 Mass. 741 [808 N.E.2d 788]. *Given* was a proceeding to commit the defendant as a sexually dangerous person. The defendant objected to the admission of a police report concerning a prior conviction for child molestation.

The report was expressly made admissible by a Massachusetts statute (Mass. Gen. Laws Ann. ch. 123A, § 14(c)), but the question remained whether its admission violated the federal Constitution. The court concluded it did not, because the report was sufficiently reliable to satisfy due process standards, and the Sixth Amendment did not apply: "The *Crawford* case has no direct bearing on this case, because, as we have made clear, the confrontation clause does not apply to civil commitment proceedings. . . . [T]he reasoning of the case rests almost exclusively on the historical background of the confrontation clause and the particular concerns motivating its ratification [citation]." (*Commonwealth v. Given*, *supra*, 441 Mass. 741, 747, fn. 9.) We agree with the reasoning and conclusion of the court in *Given*.

The second reason Angulo's *Crawford* claim fails is that *Crawford* is not violated if the defendant had a prior opportunity to cross-examine the declarant. Angulo asserts he was deprived of an opportunity during the SVPA proceeding to cross-examine the victims or the police officers involved in the Arkansas cases, because they were outside California's subpoena power. Angulo overlooks two facts.

First, Angulo had the opportunity to confront the victims or the officers in the Arkansas cases when the matters were being litigated in the *Arkansas* courts, by going to trial on the charges. If he elected not to do so, he necessarily waived his right of confrontation. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 and fn. 5 [89 S.Ct. 1709, 1712, 23 L.Ed.2d 274] [for valid guilty plea, due process requires voluntary and intelligent waiver of confrontation right].)

Second, since the Civil Discovery Act applies to SVPA proceedings, Angulo could have exercised his right of confrontation in the present SVPA proceeding by taking the depositions of the Arkansas victims or police officers and using the depositions at the trial of this case. (Code Civ. Proc., §§ 2025, subd. (u)(3)(A), 2026.) The fact the witnesses could not be summoned to appear at *trial* did not prevent Angulo from confronting and cross-examining them if he so desired.

For these reasons, we conclude the admission of the police reports did not violate *Crawford*.

C. *Denial of Defense Requests for Special Instructions*

The court refused to give the defense's special jury instructions Nos. 11, 22, and 25. Angulo claims the instructions should have been given. However, he acknowledges

that the failure to give the instructions, standing alone, was not reversible even if it was error. As we have found no error in this opinion, we therefore need not address whether the court should have given the special instructions.

D. *Evidentiary Rulings*

Angulo challenges two of the trial court's evidentiary rulings. "[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) Abuse of discretion occurs only when a ruling exceeds the bounds of reason. (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

1. *Expert testimony*

Angulo first contends the court improperly permitted Dr. Scherrer to give opinions concerning the application of the law to the facts of the case.

The court permitted Dr. Scherrer to testify that the Arkansas and Riverside offenses involved substantial sexual conduct. The court ruled the testimony was admissible to show the basis for Dr. Scherrer's expert opinion, but not for the truth of testimony itself.

"A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion . . . ." (§ 802.) The court specifically instructed the jury twice when it admitted Dr. Scherrer's testimony that the testimony was being received only as the basis for his opinion and not "for the accuracy of the legal conclusion . . . ." Jurors must be presumed to have followed instructions limiting the purpose for which evidence

is received. (*People v. Danielson* (1992) 3 Cal.4th 691, 722, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In any case, whether a particular act involves substantial sexual conduct is a question of fact. "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (Welf. & Inst. Code, § 6600.1, subd. (b)). Whether penetration, copulation, or masturbation occurred in a given case is not a question of law, and giving an opinion on the question is not testifying to a legal conclusion.

An expert can testify on a question of fact, even if the opinion "embraces the ultimate issue to be decided by the trier of fact." (§ 805.) Therefore, the court did not err in admitting Dr. Scherrer's testimony.

Dr. Scherrer also testified that the statute Angulo violated in one of the Arkansas offenses was the Arkansas equivalent of California's Penal Code section 288, subdivision (a). Angulo did not object to the testimony as a legal conclusion and therefore waived his claim of error. (§ 353, subd. (a).) In any event, the court instructed just before Dr. Scherrer gave this testimony that the testimony was being received only to show the basis for his opinion.

Dr. Scherrer also testified that the Arkansas offenses involved force and duress and that the Riverside offense involved duress. Angulo did not object to the testimony as a legal conclusion. In addition, the question of duress "is a factual question; the existence of duress always depends upon the circumstances." (*Philippine Export & Foreign Loan*

*Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1078.) As explained, *ante*, an expert can testify on a question of fact, even if the opinion embraces an ultimate issue in the case.

Admission of Dr. Scherrer's testimony was not an abuse of discretion.

2. *Exclusion of evidence regarding ASH treatment program*

To refute the inference that his failure to participate actively in the ASH treatment program showed he was likely to reoffend, Angulo elicited testimony from Dr. Scherrer that only one person out of 500 had been released from ASH. The court did not permit defense counsel to show through additional testimony that the one person released was released by court order, and the others ready to be released could not get out. The court also did not permit Dr. Scherrer to testify whether one reason ASH patients gave for refusing treatment was that even if they completed treatment they would not be released, or whether patients refused treatment because of the side effects of the medications they were required to take. The court excluded the proffered testimony for lack of relevance and undue consumption of time.

Angulo argues the court should have permitted him to present the testimony to show he had a good reason for not attending the treatment program.

Evidence is only relevant if it has a "tendency in reason to prove or disprove any disputed fact *that is of consequence to the determination of the action*." (§ 210, italics added.) Here, the relevant fact was that Angulo would not participate in treatment, not what his reason was. All three experts agreed that Angulo had committed sexually violent offenses in the past. Without treatment, it was a foregone conclusion Angulo

would not overcome his disorder and therefore would offend again. No expert testified Angulo's condition would improve enough without treatment that he would be unlikely to reoffend.

In any event, Dr. Scherrer could not have known the reason Angulo declined treatment, because Angulo never agreed to speak to him. Angulo points out Dr. Scherrer testified, based on the records he reviewed, that one of the reasons Angulo gave for not participating in the sex offender treatment program was that "nobody got out as a result of those programs . . . ." However, this statement must be interpreted in light of the rest of Dr. Scherrer's testimony concerning Angulo's reasons for declining treatment. Dr. Scherrer testified:

"It's my perception that Mr. Angulo's reasons for refusing treatment vary across time. At one point my recollection is that Mr. Angulo was telling the treatment teams that he didn't want to go into treatment because nobody was even going to get out, but if a patient started, if one of the patients or if the patients started to be released, then he would consider going to Phase II. Well, patients have started to be released and Mr. Angulo continues to refuse to go into active treatment now stating that he wants to pursue his legal options."

In addition, Angulo did not present any evidence that the unlikelihood of being released from ASH was, in fact, the reason he refused treatment. Dr. Kania testified Angulo refused treatment because he was unwilling to acknowledge that he had a sexual disorder. Given these circumstances, exclusion of the proposed testimony was not an abuse of discretion.

E. *Failure to Instruct Regarding Amenability to Voluntary Treatment*

Angulo contends the court erred in not instructing the jury to determine whether custody in a secure facility was necessary to insure that Angulo was not a danger to the health and safety of others. He cites *People v. Grassini* (2003) 113 Cal.App.4th 765 for the proposition that the court must give such an instruction sua sponte where a person presents evidence that he is amenable to voluntary treatment.

In *Grassini*, the court held that evidence that an offender is amenable to voluntary treatment upon release "creates a sua sponte duty in the trial court to instruct the jury that it is to determine whether custody in a secure facility is necessary to ensure that the individual is not a danger to the health and safety of others." (*People v. Grassini*, *supra*, 113 Cal.App.4th 765, 777, fn. omitted.) The court relied principally on three California Supreme Court decisions, *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, *Cooley v. Superior Court* (2002) 29 Cal.4th 228, and *People v. Roberge* (2003) 29 Cal.4th 979.)

In *Ghilotti*, the court stated that if an offender "is dangerous without treatment, but safe with treatment," he need not *necessarily* be treated in custody. (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th 888, 926.) Rather, evaluators can consider "whether the disorder, though dangerous if untreated, is of a kind and extent that can be effectively treated in the community, and whether the disorder leaves the person willing and able to pursue such treatment voluntarily." (*Id*. at p. 927.) Where an offender has previously been committed as an SVP, and therefore has been subject to the SVPA's mandated treatment program, "the evaluators may obviously assess his or her progress, if any, as a

factor in determining whether he or she represents a substantial danger if unconditionally released at the end of a commitment term." (*Ibid*.) Evaluators also may consider whether "there is practicable treatment, readily available in the community, which would eliminate or control the impulses, and the person's current mental condition is such that he or she can be, and is, willing and able to pursue such treatment as long as it is needed." (*Ibid*.)

In *Cooley*, the Supreme Court similarly concluded "that a determination of the likelihood of future dangerousness at the probable cause hearing if such evidence has been presented must also take into account the potential SVP's amenability to voluntary treatment upon release." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256.)

Finally, in *Roberge*, the Supreme Court said in a footnote: "Evidence of the person's amenability to voluntary treatment, if any is presented, is relevant to the ultimate determination whether the person is likely to engage in sexually violent predatory crimes if released from custody. [Citations.]" (*People v. Roberge, supra*, 29 Cal.4th 979, 988, fn. 2.)

Assuming, without deciding, that *Grassini* correctly interpreted these decisions to require a sua sponte instruction on the significance of an offender's amenability to treatment, we conclude the evidence in this case did not warrant such an instruction. After *Grassini* was decided, the same appellate district held that "*Grassini* cannot be interpreted to automatically impose on trial courts a sua sponte duty of so instructing." Rather, "such duty is conditioned on the *presence* of evidence of amenability to voluntary treatment." (*People v. Calderon* (2004) 124 Cal.App.4th 80, 92.)

*Calderon* further held that "voluntary" treatment in this context means treatment that is not "conducted in a 'custodial setting which offers mandatory treatment for the disorder.' [Citation.] As opposed to involuntary treatment, voluntary treatment features an environment where the patient is 'free in the community without any conditions, supervision, monitoring, or mandatory treatment in . . . custody.' [Citation.]" (*People v. Calderon*, *supra*, 124 Cal.App.4th 80, 89-90, quoting *People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th 888, 895, 927.)

Here, Angulo has pointed to no evidence in the record that suggests "there is practicable treatment, readily available in the community, which would eliminate or control" his disorder, and that his current mental condition is such that he "can be, and is, willing and able to pursue such treatment as long as it is needed." (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th 888, 927.) Instead, he points to evidence that, while at ASH, he voluntarily attended Father Miskella's thinking skills class in 2000 and 2001, participated in Phase I of the sex offender treatment program, and voluntarily completed an AA/NA treatment program. Viewed in the context of the whole record, this evidence did not warrant a sua sponte instruction.

First, it was not disputed that the thinking skills class was not a substitute for sex offender therapy. Dr. Scherrer testified: "Father Miskella has communicated clearly that he does not see it as specifically addressing sex offending or replacement for the sex offender commitment program." Dr. Starr testified: "And Father Miskella by his own words said that it is not intended to be a replacement for sex offender treatment." She

further testified that the thinking skills program "doesn't include many things that are in the sex offender treatment program . . . ."

Moreover, the record demonstrated that Angulo's attendance at the thinking skills program was no indication he was motivated to pursue treatment if he were released. Dr. Scherrer testified Angulo attended Phase I of the sex offender program but did not complete it. He only attended "until a change in hospital policy made it possible for him to have greater freedoms and greater ability to do other activities even if he refused treatment. So the first chance he had to get out without paying a penalty, he did."

Furthermore, Dr. Starr explained that Phase I of the program was "simply information . . . . The real treatment begins in Phase II. He has never attended." She also testified that Angulo had "done nothing to address his sex offender specific issues."

There similarly was nothing to suggest Angulo's completion of the drug and alcohol program showed he would be amenable to voluntary treatment for his mental disorder if he were released. Dr. Starr testified that Angulo completed the program, but neither she nor either of the other experts said this would make him more amenable to voluntary treatment for his mental disorder upon his release. In fact, Dr. Starr testified pointedly about Angulo's continued sexual misbehavior even while in custody:

"While at Atascadero he has continued to engage in sexual behaviors with other patients . . . to the point where he's been caught receiving oral copulation in another patient's room . . . . I mean, he knows he's going to get caught, this is going to come out at trial, and he persists in doing this."

This evidence is not even remotely comparable to the evidence found to support a sua sponte instruction in *People v. Grassini*, *supra*, 113 Cal.App.4th 765. In that case, the offender "requested treatment and received individual and then group therapy" while in prison (*id*. at p. 769); "was recognized as a highly contributing and motivated member of his therapy group"; had "made 'significant progress in gaining insight into the factors that led up to his offense'"; and "had gained insight into victim empathy, which is important in preventing future offenses." (*Id*. at p. 770.)

In addition, Grassini "acknowledged his need for lifelong therapy because he was a pedophile" and presented expert testimony that he had "had successfully recovered as a child molester." (*People v. Grassini*, *supra*, 113 Cal.App.4th 765, 773) He also presented expert testimony that he was not likely to reoffend "because of his efforts to change and improve himself while he was in prison, including taking college courses, being active in treatment and teaching other prisoners" and that "he had been a 'standout participant' in therapy, where he worked to overcome his cognitive distortions and learned to empathize with his victims." (*Id*. at p. 774).

The Supreme Court in *Ghilotti* said that "given the compelling protective purposes of the SVPA, the evaluators must weigh the possibility of voluntary treatment with requisite care and caution." (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th 888, 929.) Viewing this record in that light, we conclude Angulo did not present sufficient evidence to require a sua sponte instruction.

F. *Cumulative Error*

"The zero effect of errors, even if multiplied, remains zero. [Citation.]" (*People v. Calderon*, *supra*, 124 Cal.App.4th 80, 93.) As we have found no merit in any of Angulo's claims we have addressed, and as Angulo acknowledges the claim we have not addressed would not support reversal even if we found it to be meritorious, his cumulative error claim fails.

III

DISPOSITION

The order appealed from is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
Acting P.J.

We concur:

WARD
J.

GAUT
J.